



December 6, 1999

Mr. Miles T. Bradshaw
Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR99-3501

Dear Mr. Bradshaw:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 130022.

The Houston Independent School District ("HISD") received a request to view "[a]ny and all requests filed with the district under the Texas Open Records Act or the federal Freedom of Information Act between January 1, 1996 and September 30, 1999 [and] [a]ll district responses to such requests and any subsequent correspondence relating to those requests." You state that HISD does not contend that any requests or responses to any requests are exempt, except to the extent that they contain student information made confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which is incorporated into the Act by section 552.026 of the Government Code. You do not seek an opinion from this office about the required public disclosure of the information subject to FERPA. Nor need you do so. *See* Open Records Decision No. 634 (1995). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). You have submitted a representative sample of information that you maintain is responsive to the request for "any subsequent correspondence relating to those requests."¹ You assert that portions of this information are excepted from disclosure based on sections 552.101, 552.107(1) and 552.111 of the Government Code.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Before we consider the exceptions you raise, we will first address the question you raise of whether HISD must permit the requestor to view original documents containing confidential information. The HISD must not permit the requestor to view original documents containing confidential information. Gov't Code § 552.352. The HISD must redact confidential information to give access to a public record and may charge the requestor for the cost of making a copy of the page from which confidential information must be redacted. *Id.* § 552.271.

Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 at 5; 462 (1987) at 13-14. Thus, the exception applies only to information that reveals attorney advice and opinion, or client confidences. *See* Open Records Decision No. 574 (1990).

We have reviewed the submitted information. We agree that section 552.107(1) applies to portions of the information. We have marked the documents accordingly.

Since we do not find that section 552.107(1) applies to the information in its entirety, we address the other exceptions you raise. Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law, including information made confidential by statute. You raise section 552.101 in conjunction with sections 552.107 and 552.111 of the Government Code. However, other exceptions in the Act are not law that makes the information confidential for purposes of section 552.101. Nor does section 552.101 encompass discovery privileges. *See* Open Records Decision No. 575 (1990). Thus, we cannot conclude that the information is protected from disclosure under section 552.101.

Your section 552.111 claim rests on the attorney work product privilege. This office has stated that if a governmental body wishes to withhold attorney work product under section

552.111, it must first show that the work product was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). See Open Records Decision No. 647 (1996) at 5. The HISD has not established that the information at issue was created for trial or in anticipation of litigation. Consequently, the HISD may not withhold any of the information based on section 552.111 of the Government Code as attorney work product.

In conclusion, the HISD may withhold from disclosure the information we have marked as covered by section 552.107(1) of the Government Code. The HISD must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/jc

Ref.: ID# 133002

encl. Marked documents

cc: Ms. Anna Werner
KHOU-TV
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(w/o enclosures)